

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 23, 2014

v

WILLIAM THEODORE-HARRY OLDS,

Defendant-Appellant.

No. 316581
Wayne Circuit Court
LC No. 13-001170-FC

Before: FITZGERALD, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of second-degree murder of Audrey Pharr, MCL 750.317. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 360 to 500 months' imprisonment. We affirm.

I

Defendant and Pharr had been in a relationship for several years and, according to defendant, Pharr lived with him sometimes. Defendant spoke to his sister, Ruth Hubbard, on the telephone three times throughout the day prior to Pharr's death. During those telephone calls, Hubbard heard defendant yelling at Pharr. She also heard thumping and banging in the background. Hubbard testified that defendant seemed sad and upset. She also testified that, in the past, she had seen defendant slap and hit Pharr.

During a late-night telephone call, defendant told Hubbard that he was afraid and nervous, Pharr had had a seizure after she choked on some food, and she would not wake up. An ambulance arrived while Hubbard was on the telephone with defendant. Christopher Barber of the Detroit Fire Department, EMS Division, arrived at defendant's house early in the morning of on December 31, 2012, after receiving a 911 call regarding a woman choking. Barber observed Pharr lying in the doorway and she was not breathing. Defendant was standing over Pharr while wearing a pair of white surgical gloves. Defendant told Barber to hurry up and that Pharr had choked. Barber did not recall defendant stating that Pharr had a seizure.

Barber noticed that Pharr had old bruises and scratches on her body, including an old bruise over her eye that was dark and swollen. She also had an eye injury, which Barber testified looked like it had been inflicted hours earlier, and newer scratches on her knuckles. Pharr was taken to the hospital, where she underwent surgery, but she died by 5:30 a.m.

Dr. Aveneesh Gupta of the Wayne County Medical Examiner's Office performed a post-mortem medical examination on Pharr and testified as an expert at trial. He opined that Pharr suffered from blunt-force trauma to the abdomen, which caused Pharr's internal injuries and death, and these injuries could have been caused by "anything from a fist, a foot, a microphone, even falling down." But, in Dr. Gupta's opinion, they were inflicted by an object that was "circular in shape." Dr. Gupta observed that Pharr had multiple contusions and abrasions—some new and others at various stages of healing—all over her body. Dr. Gupta also observed rib fractures, which could have been older than her other injuries. Finally, Dr. Gupta's medical examination revealed that several hairs on the back of Pharr's head had been pulled out.

Defendant testified that he did not cause Pharr's injuries or death. Defendant claimed that, although he spent part of the day prior to Pharr's death with her, she left his house late in the evening to go to the house of a man only identified as "Rich." Defendant testified that Rich "jumped on" Pharr while she was at his house and beat her up, and when Pharr returned, she fell and had a seizure. Defendant testified that he tripped over Pharr twice and his feet hit her chest.

The trial court convicted defendant of second-degree murder, finding that defendant and Pharr had an assaultive relationship and concluded that Pharr's internal injuries were caused by defendant.

II

Defendant first argues that there was insufficient evidence for the trial court to convict him of second-degree murder. We disagree.

This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial. *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008). "[T]his Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *Id.* The trier of fact determines the credibility of witnesses and the weight given to each piece of evidence. *Id.* at 619.

Murder is defined as the unlawful killing of another person with malice aforethought. *People v Goecke*, 457 Mich 442, 463; 579 NW2d 868 (1998). "The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *Id.* at 463-464. "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* at 464. The prosecution may prove the elements of second-degree murder through circumstantial evidence. *People v Fletcher*, 260 Mich App 531, 560; 679 NW2d 127 (2004). In order to prove that the defendant caused the victim's injuries, the prosecution must prove beyond a reasonable doubt that defendant was the factual cause and the proximate cause of the victim's injuries. See *People v Schaefer*, 473 Mich 418, 435; 703 NW2d 774 (2005), clarified in part on other grounds by *People v Derror*, 475 Mich 316 (2006). The test for factual causation is to examine whether, but for the defendant's conduct, the victim's injury would not have occurred. *Id.* at 435-436. The test for proximate causation is to examine whether defendant's conduct was "too remote or unnatural" to be considered a cause of the victim's injury. *Id.* at 436.

Defendant contends that there was insufficient evidence that he was the person who caused the injuries leading to Pharr's death. Defendant argues that this case is similar to *People v Fisher*, 193 Mich App 284; 483 NW2d 452 (1992). In *Fisher*, the prosecution failed to provide evidence of any act that resulted in the missing victim's death and failed to provide any physical evidence, including the victim's body, connecting the defendant to her death. *Id.* at 286-289. Instead, the only evidence that the prosecution provided that connected the defendant with the victim's death was evidence of the defendant's opportunity (he was last seen with the victim) and motive (including a history of marital discord and abuse), which this Court held are insufficient by themselves to establish guilt. *Id.* at 288-289.

In contrast, this Court in *Fletcher* upheld the defendant's second-degree murder conviction because there was sufficient circumstantial evidence to convict the defendant. *Fletcher*, 260 Mich App at 559-564. First, the defendant was the only person other than the victim who was present when the victim was shot. *Id.* at 562. In addition, the evidence indicated that the victim could not have shot herself. *Id.* Furthermore, blood "mist" was found on the defendant's shirt even though he claimed to be in the bathroom when the victim was shot and the evidence indicated that the defendant had washed his hands before calling 911. *Id.* at 562-563. Finally, there was also evidence that the defendant had motive to kill the victim. *Id.*

Defendant is correct that the prosecution presented no direct evidence that he caused Pharr's injuries. See *Fletcher*, 260 Mich App at 560. However, this case can be compared to *Fletcher* and distinguished from *Fisher* because the prosecution provided sufficient circumstantial evidence for a rational trial court to find that defendant was the cause of Pharr's injuries. See *id.* at 559-564; *Fisher*, 193 Mich App at 286-289.

Given Hubbard's testimony that defendant had previously slapped and hit Pharr and Dr. Gupta's testimony that Pharr had injuries all over her body, some of which were over a day old, a rational trier of fact could have inferred that defendant and Pharr had an abusive relationship and defendant caused Pharr's older injuries. From that same testimony, along with evidence that defendant was upset on the day leading to Pharr's death, that the couple had been fighting, that defendant told Hubbard that he observed Pharr have a seizure and choke, and that defendant was standing over Pharr, who appeared to be dead, when EMS arrived, a rational trier of fact could have found that defendant was with Pharr when she was fatally injured, that defendant had a motive to cause Pharr's death or her great bodily harm, and that defendant caused Pharr's death. *Fletcher*, 260 Mich App at 559-564. The trial court properly weighed the evidence and evaluated the credibility of the witnesses in favor of the prosecution. See *Kanaan*, 278 Mich App at 619. We conclude there was sufficient evidence for the trial court to find defendant guilty of second-degree murder.

III

Defendant next contends that the trial court erred during sentencing by assigning 10 points for offense variable (OV) 1 and 50 points for OV 7. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Additionally, "[w]hether the facts, as found, are adequate to satisfy the scoring conditions

prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” *Id.*

A

First, defendant argues that the trial court should have assessed zero points for OV 1. We disagree.

OV 1 applies to the aggravated use of a weapon during the commission of a crime. *People v Morson*, 471 Mich 248, 256; 685 NW2d 203 (2004). MCL 777.31(1) governs the score for OV 1 and provides:

- (a) A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon 25 points
- (b) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon 15 points
- (c) The victim was touched by any other type of weapon 10 points
- (d) A weapon was displayed or implied 5 points
- (e) No aggravated use of a weapon occurred 0 points

A weapon is defined as “ ‘1. any instrument or device used for attack or defense in a fight or in combat. 2. anything used against an opponent, adversary, or victim [or] 3. any part or organ serving for attack or defense, as claws, horns, teeth, or stings.’ ” *People v Ball*, 297 Mich App 121, 125; 823 NW2d 150 (2012) (citation omitted). “OV 1 is an ‘offense-specific’ variable; therefore, in scoring OV 1, the trial court was limited to “considering the sentencing offense alone.” *People v Chelmicki*, 305 Mich App 58, 71-72; 850 NW2d 612 (2014).

The record supports an inference that defendant inflicted countless injuries upon the victim using a weapon, including cigarettes, but many of those injuries were healing and could not have been inflicted at the time of the sentencing offense. *Id.* Further, Dr. Gupta opined that the blunt-force trauma to the abdomen, which caused Pharr’s internal injuries and death could have been inflicted by “anything from a fist, a foot, a microphone, [or] even falling down.” But Dr. Gupta also testified regarding the “pattern abrasion” on Pharr’s right abdomen—“It’s more circular. So, it reminds [me] of a circular object, rather than a fist.” Later, Dr. Gupta clarified the injuries were inflicted by an object that was “circular in shape,” not hands or feet.” Thus, Dr. Gupta’s testimony indicated that defendant used an instrument to inflict some of Pharr’s injuries, see *Ball*, 297 Mich App at 125, and provided sufficient evidence for the trial court to find by a preponderance of the evidence that defendant used a weapon when he murdered Pharr. See *Hardy*, 494 Mich at 438.

Defendant also contends that the trial court erred in assessing 10 points for OV 1 because the trial court found on the record at trial that there was no evidence that any type of weapon was used to inflict the injuries on Pharr. We conclude that the defendant mischaracterizes the trial

court's finding. Rather than finding that defendant did not use a weapon, the trial court merely stated that a weapon had not been admitted into evidence, and that did not "mean that the conclusion that [Dr. Gupta] reached wasn't a valid conclusion." Furthermore, even if the trial court had found that the prosecution did not prove beyond a reasonable doubt that defendant used a weapon to commit the murder, this would not preclude the trial court from finding during sentencing that the evidence established by a preponderance of the evidence that defendant used a weapon to commit the murder. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). For all of these reasons, defendant's claim that the trial court erred in assessing 10 points for OV 1 fails.

B

Second, defendant argues that the trial court erred in assessing 50 points for OV 7. Defendant contends that the trial court should have assessed zero points for OV 7. We disagree.

OV 7 is scored for aggravated physical abuse. See *People v Hunt*, 290 Mich App 317, 323; 810 NW2d 588 (2010). A trial court will calculate a score for OV 7 when the defendant is convicted of second-degree murder because second-degree murder is a crime against a person. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005). MCL 777.37(1) governs the score for OV 7 as follows:

- (a) A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense 50 points
- (b) No victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense 0 points

Sadism is defined as " 'conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification.' " *People v Blunt*, 282 Mich App 81, 89; 761 NW2d 427 (2009), quoting MCL 777.37(3).

Defendant claims that there was no evidence that defendant inflicted the injuries on Pharr, and that accordingly, 50 points should not have been assessed to OV 7. However, as we concluded earlier in this opinion, there was sufficient evidence on the record for a rational trier of fact to find that defendant caused Pharr's injuries. See *Kanaan*, 278 Mich App at 619.

Defendant also claims that the trial court erred because it found on the record at trial that there was no torture in this case. While defendant is correct that the trial court found that the prosecution did not prove beyond a reasonable doubt that the victim was tortured, nevertheless, the trial court was not precluded from concluding that a preponderance of the evidence supported a finding, for purposes of sentencing, that defendant tortured Pharr. *Osantowski*, 481 Mich at 111. Regardless, the trial court assessed 50 points to OV 7 because the case involved sadism and not because the case involved torture. The trial court did not need to make a finding on all four alternative methods of aggravated physical abuse listed in MCL 777.37 in order to find that aggravated physical abuse occurred. *Hardy*, 494 Mich at 441. Instead, the trial court's finding that defendant treated Pharr with sadism was sufficient to assign 50 points to OV 7. See *id.*

The trial court did not err by finding that defendant treated Pharr with sadism because there was evidence presented at trial that defendant subjected Pharr to extreme pain inflicted to produce suffering. See *Blunt*, 282 Mich App at 89. Hubbard heard defendant and Pharr fighting throughout the day before her death and Pharr had recent injuries in varying stages of healing, which indicated that Pharr was subject to prolonged pain. *Id.* Moreover, the large number of recent injuries over Pharr's whole body, including some that Dr. Gupta opined were inflicted through the use of a physical object, indicates that defendant inflicted extreme pain. *Id.*; see *Hardy*, 494 Mich at 440 n 26. Therefore, the trial court did not err in assessing 50 points for OV 7 and defendant's challenge to the scoring of OV 7 fails.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Kurtis T. Wilder

/s/ Donald S. Owens